UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PEPPERIDGE FARM, INCORPORATED,	)	
	)	
and	)	**Case No. 01-RC-155159**
	)	
CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL 633 OF NEW HAMPSHIRE	)	

PEPPERIDGE FARM, INCORPORATED'S
OPPOSITION TO PETITIONER'S REQUEST FOR REVIEW

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INTRODUCTION

This matter arises out of a union petition seeking to convert 25 Boston-area independent distributors of Pepperidge Farm products into Pepperidge Farm "employees" under Section 2(3) of the National Labor Relations Act ("NLRA" or "Act"). These distributors, who are also referred to as Sales Development Associates (or "SDAs"), own and operate exclusive distribution territories within a network of 3,700 independent contractors doing business with Pepperidge Farm across the country. This independent contractor status, which distributors have enjoyed since the founding of Pepperidge Farm over 70 years ago, has allowed SDAs to build substantial equity in their territories – often hundreds of thousands of dollars. It is the most valuable asset that many of them will ever own.

After considering the evidence presented over a four-day hearing, which included the testimony of three Company witnesses and one SDA and submission of nearly 60 exhibits, together with extensive post-hearing briefing, the Regional Director issued a 23-page decision confirming that the 25 SDAs are independent contractors, rather than employees, under the multi-factor balancing test set forth in *FedEx Home Delivery*, 361 NLRB No. 55 (Sept. 30, 2014). The Regional Director carefully explained his analysis of each *FedEx* factor before concluding as follows:

> Weighing **all of the incidents** of the SDAs' relationship with PF, I find that PF has carried its burden of establishing that the SDAs are independent contractors. Thus, SDAs exercise significant control over the details of their work. They are engaged in an occupation that is distinct from that of PF, in that they do not do business in the name of PF. They perform their work without substantial supervision by PF. They are compensated based on the success or failure of their efforts and based on the value of their routes, rather than by the hour. They refer to themselves as independent businesspersons. They render services as part of an independent business, in that they buy and sell their routes, pass their routes on to their heirs when they die, hire employees, and enjoy the opportunity for entrepreneurial gain and run the risk of entrepreneurial loss.

Decision at 23 (emphasis added). The Regional Director's ruling was the latest in a line of Board decisions reaffirming the independent contractor relationship between distributors and suppliers in the food industry. *See, e.g.*, *West Virginia Baking Co., Inc.*, 299 NLRB 306 (1990); *Bellacicco & Sons, Inc.*, 249 NLRB 877 (1980); *Gold Medal Baking Co., Inc.*, 199 NLRB 895 (1972).

Having failed in its first attempt to fundamentally alter the longstanding business relationship between the SDAs and Pepperidge Farm, Petitioner now requests that the Board give it another shot at doing so. Indeed, while Petitioner's Request for Review ("RFR") asserts that the Regional Director "departed" from Board precedent and made "clearly erroneous" findings on "substantial factual issues," as it must in order to meet the Board's stringent standard for granting review under Section 102.67(c), in reality the RFR is little more than a request that the Board reweigh the hearing evidence on its own. The RFR rehashes the same facts, and arguments, presented in its post-hearing brief – often verbatim.

Contrary to Petitioner's suggestion, the Regional Director carefully acknowledged Petitioner's facts and arguments, fully considered them when addressing the multi-factor independent contractor test, and dutifully applied *FedEx* and related Board precedent in holding that a majority of the factors favored independent contractor status. Far from "departing" from any Board precedent, much less to a degree that raises "a substantial question of law or policy" under Section 102.67(c)(1), the Regional Director faithfully adhered to it. In fact, while the Regional Director issued his decision before the Board's recent joint employer ruling in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), which Petitioner relies upon here even though that decision did not address the governing independent contractor test, *Browning-Ferris* is not in conflict with *FedEx*. Insofar as Petitioner argues that

Browning-Ferris requires analysis of Pepperidge Farm's "potential" (and not just actual) control over the details of the distributors' work, which is only one of the eleven factors considered under the independent contractor test, the Regional Director expressly did so in his decision. And far from making any "clearly erroneous" findings on a "substantial factual issue," much less one that "prejudicially affected" the rights of Petitioner under Section 102.67(c)(2), the Regional Director's factual findings under each of the *FedEx* factors cited in support of his independent contractor determination are fully substantiated by the record.

In the absence of any "compelling" grounds for review under Section 102.67(c), the request for review must be denied.

I. LEGAL STANDARDS

A. NLRB Request for Review Standard

Section 102.67(c) of the Board's Rules and Regulations provides that "the Board will grant a request for review only when *compelling reasons* exist therefor." *See* NLRB Rules and Regulations, 29 C.F.R. § 102.67(c) (emphasis added). That is, the Board should reject the Petitioner's RFR unless it establishes one or both the following grounds cited in the RFR:

> (1)That a *substantial question of law or policy* is raised because [of]… (ii) a *departure from*, officially reported Board precedent.
>
> (2)That the Regional Director's decision on a *substantial factual issue* is *clearly erroneous* on the record and such error *prejudicially affects* the rights of a party.

Id. at Section 102.67(c) (emphases added). The United States Supreme Court has explained that under a "clearly erroneous" standard, "[i]f the [fact finder's] account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing body] may not reverse it even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

B. The NLRB's Multi-Factor Independent Contractor Test

Section 2(3) of the NLRA excludes from the definition of "employee" an individual having the status of an independent contractor. As reflected in *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998) and *Argix Direct, Inc.*, 343 NLRB 1017 (2004), and reaffirmed and refined in *FedEx Home Delivery*, 361 NLRB No. 55 (Sept. 30, 2014), the Board relies on the common law test of agency to determine if an individual is an independent contractor or employee. The Board most recently applied *FedEx* in *Porter Drywall, Inc.*, 362 NLRB No. 6 (Jan. 29, 2015) to find independent contractor status.

The Board has outlined 11 specific factors to consider in these cases. *FedEx*, 361 NLRB No. 55, slip op. 2-3 (citing the relevant factors). When reviewing the factual record, the Board explained that the following principles must be applied:

> (1) All factors must be assessed and weighed;
>
> (2) No one factor is decisive;
>
> (3) Other relevant factors may be considered, depending on the circumstances; and
>
> (4) the weight to be given a particular factor or group of factors depends on the factual circumstances of each case.

Id. With respect to the last principle, a factor "may be entitled to unequal weight [] because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other." *FedEx*, 361 NLRB No. 55, slip op. 18, n. 86. The Board has recognized that this multi-factor balancing test is "quite fact-intensive," *Argix*, 343 NLRB at 1020. By its very nature, therefore, this test requires a substantial exercise of discretion and judgment by regional directors.

II. THE REQUEST FOR REVIEW MUST BE DENIED BECAUSE THE REGIONAL DIRECTOR'S DECISION DOES NOT RAISE A "SUBSTANTIAL QUESTION OF LAW OR POLICY" BASED ON A "DEPARTURE" FROM BOARD PRECEDENT, NOR DOES IT INCLUDE ANY "CLEARLY ERRONEOUS" DECISION ON A "SUBSTANTIAL FACTUAL ISSUE"

In concluding that the Pepperidge Farm SDAs are independent contractors, the Regional Director went to great lengths to analyze the factual record and consider each of the *FedEx* factors. The ultimate findings reached by the Regional Director were well-supported by the facts and evidence developed over a four-day hearing. As detailed below, Petitioner has not demonstrated any of the limited grounds for granting review under the stringent standard in Section 102.67(c). The Petitioner's arguments can be summed up as a disagreement with how the Regional Director balanced certain facts and reflects no "departure" from Board precedent or "clearly erroneous" factual determinations. To the contrary, the Regional Director's decision is fully supported by Board precedent and well-grounded in the record.

A. Control of Work Details (Factor #1)

1. No Departure from Board Precedent

Petitioner's initial argument is that the Regional Director "departed" from Board precedent by not applying a decision that issued seven days after his ruling in this matter. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015). Petitioner appears to suggest that *Browning-Ferris* requires the factfinder to *ignore* evidence of actual control (or lack thereof) and day-to-day practices and instead to solely consider the "potential" right to control under the parties' contractual agreement. RFR at 2, 5. However, the Petitioner's reading and application of *Browning-Ferris* is patently incorrect. Moreover, it does not show the Regional Director "departed" from Board precedent for at least three reasons.

First, *Browning-Ferris* is a "joint employer" decision, not an "independent contractor" decision. The Board majority noted that its decision "does not modify any other legal doctrine or

change the way that the Board's joint-employer doctrine interacts with other rules or restrictions under the Act." 362 NLRB No. 186, slip op. 20, n.120. In fact, the Board majority expressly disclaimed the decision's application to the independent contractor context, and reaffirmed that *FedEx* controls. *Id.* at slip op. 14, n.72 (distinguishing *FedEx* test from joint employer test, in response to dissent's statement that "the Board has assigned probative weight only to evidence of actual authority or control in its assessment of various statutory exclusions, including independent contractors and supervisors"). *Browning-Ferris* did not revise the *FedEx* test that the Regional Director carefully applied.

Second, nothing in *Browning-Ferris*, or *FedEx* for that matter, suggests that evidence of actual control or practices is irrelevant under Factor #1. To the contrary, *Browning-Ferris* merely clarified in the joint employer context that evidence of potential control, as opposed to only actual control, is relevant as part of the overall analysis. This is how the Board in *Browning-Ferris* reviewed the factual record; it considered both "potential" control arguments, as well as evidence of whether or not that control was actually exercised in the day-to-day dealings with individuals in the petitioned-for unit. *Browning-Ferris*, 362 NLRB No. 186, slip op. 18-19 (citing operative contractual agreement on hiring and firing rights, but also addressing two specific instances where alleged joint employer requested dismissal of contractor employees; citing and relying on specific instances where managers directly communicated and instructed contractor employees on work performance and productivity). And that is what the Regional Director did in this case, as further discussed below in Section II.A.2. Nowhere did the Regional Director deem potential control evidence as "irrelevant" or "ignore it completely" as Petitioner claims. RFR at 4, 8.[1]

[1] Were Petitioner's legal position accurate, there would be little to no need for a pre-election hearing to resolve the independent contractor issue, at least on the right to control element, because the matter would be fully

Third, Petitioner overstates the types of the control, whether potential or actual, that are probative of employee status under the Board's precedent. For control to constitute evidence of employee status, it must extend to the "essential details of the . . . day-to-day work," *FedEx*, 361 NLRB No. 55, slip op. 12, rather than simply the outcome or results that must be achieved under the contract. *See Porter*, 362 NLRB No. 6, slip op. 3 (contract terms do not evidence day-to-day "control" unless *the manner* in which the counterparty meets such obligations is controlled); *see also Browning-Ferris*, 362 NLRB No. 186, slip op. 16 ("We do not suggest today that a putative employer's bare rights to dictate the results of a contracted service or to control or protect its own property constitute probative indicia of employer status."); *id.* at 12 (observing that "service under an agreement to accomplish results or to use care and skill in accomplishing results" is not evidence of employment); *Gold Medal Baking*, 199 NLRB at 896 ("[W]e do not believe that the provisions of the distributor agreements, detailed above, impose the types of restrictions on the distributors which, without more, would require a finding that the Employer has reserved to itself control over the means by which the distributors sell and deliver its bakery products.").[2]

While Petitioner argues that certain provisions in the parties' Consignment Agreement reflect potential control, RFR at 6-7, none of these terms dictate *how* an SDA must perform the essential details of his or her day-to-day work. To the contrary, the terms merely identify the *results* that the SDAs are expected to achieve – for example, maximizing product sales through

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resolved by the bare contractual terms without any evidence on how those terms are implemented or understood by the parties in practice.

[2] In *Browning-Ferris*, the putative joint employer had the ability to control "the processes that shape the day-to-day work of the petitioned-for employees" and make "the core staffing and operational decisions that define all employees' work days," including "unilateral control over the speed of the [work] streams and specific productivity standards,"; "assign[ing] the specific tasks that need to be completed, specify[ing] where [the] workers are to be positioned, and exercis[ing] near-constant oversight of employees' work performance"; "specif[ying] the number of workers that it requires, dictat[ing] the timing of employees' shifts, and determin[ing] when overtime is necessary." 362 NLRB No. 186, slip op. 18-19. Much of that flowed from the operative contractual agreement between the parties. As further discussed below, in contrast to *Browning Ferris*, Pepperidge Farm has no control, real or potential, over any such day-to-day work details for the SDAs.

soliciting customers and adequately supplying them with products – with the SDA and the SDA alone deciding *how* to achieve them. *See* ¶¶ 4-5, 7, 19. In particular, Pepperidge Farm has no contractual right to control the following "details" for contractual performance:

- How an SDA will solicit chain retail stores;
- How an SDA will solicit cash retail stores;
- How SDAs will maintain an adequate or fresh supply of product at the stores;
- What days or hours an SDA will work to provide services;
- Whether the SDA will perform those services himself or herself, or instead hire an employee or contractor to perform those functions;
- How SDAs will effectively utilize advertising and promotional programs;
- How an SDA will maintain efficient distribution services;
- How an SDA will provide and maintain adequate equipment or facilities;
- How an SDA will comply with laws and regulations;
- How an SDA will maintain sufficient business records; or
- How an SDA will maintain his or her appearance.

Nor does the Snacks Stale Policy show "potential" control over details of SDA work performance, as alleged by Petitioner. RFR at 7-8. The Policy is not a contractual mandate; the SDAs have the option to follow (or not follow) the Policy. *See* P1 ("It should be understood that this [stale] policy which provides you a privilege to receive credit and is not part of the Consignment Agreement."); P3 (noting that "if a distributor chooses to participate in the Pepperidge Farm Stale Policy…."). Furthermore, the Policy itself merely sets forth "expectations" of SDAs in order to earn these stale privileges, not any fixed mandates. P3 ("The following criteria listed below are *expected* for a Pepperidge Farm independent distributor to have the privilege to return Stale Products to Pepperidge Farm.") (emphasis added). Finally, even apart from the absence of potential control over day-to-day work details, there is no record

of the Policy "expectations" ever being enforced or applied to the SDAs in the petitioned-for unit. (P3; T83-84, 289-91).

In sum, the Regional Director did not "depart" from Board precedent in analyzing Factor #1.

2. No Clear Error on Substantial Factual Issue

Beyond the argument that the Regional Director "departed" from Board precedent, it is difficult to discern from the RFR what "clear error" the Regional Director allegedly made based on the factual record. As admitted by the Petitioner, the Regional Director cited and summarized the Petitioner's sole evidence of potential control, the Consignment Agreement and the optional Snack Stale Policy in this decision, and even considered those two documents in the context of his "right to control" analysis. RFR at 3-5; Decision at 16. Again, the fact that the Regional Director did not give these terms as much weight as the Petitioner wanted, or otherwise considered the lack of evidence on actual or day-to-day control over work details, is not "clear error."

While Petitioner identifies evidence in the record that it believes supports the "right to control" element, RFR at 9-11, the Regional Director properly relied on several critical components of the SDAs' business for which Pepperidge Farm has no right to control:

- How frequently the SDAs order product;
- How much of each product the SDA orders;
- How much product to stock on customer shelves;
- The hours and days of the week on which the SDAs work;
- How frequently the SDAs service their stores;
- The order in which SDAs make deliveries or visit stores;
- Whether the SDAs perform the work themselves or hire employees or contractors to perform some or all of the work, and whether on a temporary or permanent basis;
- Whom the SDAs hire as helpers for their routes;

- How any employees or contractors hired by the SDAs should be compensated.

Decision at 16-17. As the Regional Director observed, these facts stand in marked contrast to those in *FedEx*, where "FedEx exercise[d] pervasive control over the essential details of drivers' day-to-day work." *Id.* at 17 (citing 361 NLRB No. 55, slip op. 12). FedEx required drivers to be available to perform deliveries at certain hours and days of the week. FedEx also controlled driver delivery or service areas, including the number of packages for delivery and the necessary stops to be made, along with delivery "cut off" times for later in the day, such as 8pm. FedEx also assisted its drivers with FedEx-employed pools of replacement drivers to cover for open routes, vacations, and sick days. None of these indicia of "fundamental control over . . . job performance" are present here. *Id.* at slip op. 13. Those facts stand in marked contrast to *Browning Ferris* as well, as noted above in footnote 2.

Petitioner also complains that PF exercises substantial control over how SDAs engage in selling of product, especially at the chain stores. Petitioner asserts that "there is not a single essential element of the sales portion of the work performed by SDAs that is not entirely controlled by PF acting in conjunction with the chain stores' buying and marketing representatives." RFR at 10. That statement is belied by the factual record. SDAs have substantial discretion and control over their own sales activities, including in the following areas:

- Driving increased sales in existing chain accounts, whether through promotional activities, customer service, special in-store displays, or advertising on social media.
- Driving increased sales at existing or future cash accounts, which are managed exclusively by the SDAs, including through negotiating prices with customers.

(T170-72, 361, 374-75, 380-82). Petitioner even admits that "SDAs may attempt to 'sell-in' an additional display at the store level and sometimes the SDAs are successful in adding an additional promotional display." RFR at 10, n. 11. The fact that Pepperidge Farm is involved in

promoting sales and related marketing efforts with chain stores does not undermine the SDAs' independent control over their own sales-related activities.

In sum, the Regional Director properly exercised his discretion with Factor #1 and balanced the record evidence without any "clear error."

B. Distinct Occupation or Business (Factor #2)

1. No Departure from Board Precedent

Petitioner also complains that the Regional Director departed from *FedEx* by holding that the SDAs have a "distinct business" from Pepperidge Farm. RFR at 11-13. Yet the relevant facts and circumstances of *FedEx* are fundamentally different than those at issue here. In *FedEx*, the Board ruled that "[b]y virtue of their [FedEx] uniforms and logos and colors on their vehicles, [FedEx] drivers are, in effect, doing business in the name of FedEx rather than their own." *FedEx*, 361 NLRB No. 55, slip op. 13. *FedEx* observed that these facts distinguished that case from an earlier decision involving drivers, *Argix Direct*, 343 NLRB at 1020-21, "where trucks could be any make, model, or color, and drivers could place their own corporate names or logos on trucks." *Id.* at slip op. 13, n.46. As set forth below, the record evidence here under Factor #2 is at least as compelling as that cited in favor of independent contractor status in *Argix Direct* and stands in stark contrast to the evidence presented in *FedEx* – as the Regional Director recognized.

Petitioner fails to cite any Board precedent holding that, in a similar context, the "distinct occupation or business" factor must support the Petitioner.

2. No Clear Error on Substantial Factual Issue

Petitioner relatedly claims that the Regional Director "understated" evidence allegedly showing the "interconnectedness" between Pepperidge Farm and the SDAs. RFR at 12. In other words, the Petitioner effectively seeks to have the Board reweigh the evidence that the Regional

Director carefully considered and reach a contrary result. Petitioner's belief that any favorable evidence should have outweighed the unfavorable evidence does not justify granting review under the Board's "clear error" standard. In any event, the Regional Director's weighing of the evidence under the "distinct business" factor was fully supported by the record, especially when compared to the facts in *FedEx*. In fact, it is Petitioner who "understates" the evidence on which the Regional Director relied in concluding that this factor weighed in favor of independent contractor status. Far from giving "controlling weight" to the facts that some SDAs do not wear Pepperidge Farm apparel and do not have Pepperidge Farm markings on their trucks, as Petitioner suggests (RFR at 13), the Regional Director grounded his decision on a far more extensive set of factual findings:

- "SDAs do not do business in the name of PF";
- "[T]hey are not required to wear PF uniforms or PF badges";
- "They are not required to place PF logos on their trucks, and many [of the] SDAs choose not to";
- "The logos on the trucks of several of the . . . SDAs identify them as an entity separate from PF, such as 'JP Distributors' or 'Endicott Distributors'";
- "SDAs have their own business cards and letterhead";
- "PF prohibits SDAs from using the Pepperidge Farm trademark, logo, or image on their business cards or letterhead";
- "PF prohibits SDAs . . . from using the Pepperidge Farm name as part of [the SDA's] business name in a way that tends to confuse the separate identities of the two parties";
- "SDAs are required to obtain their own business insurance";
- Some of the SDAs have "incorporated their businesses as separate entities";
- Some of the SDAs "market their businesses on social media in the name of their business."

Decision at 17.

In sum, the Regional Director properly exercised his discretion with Factor #2 and balanced the record evidence without any "clear error."

C. Whether the Work is Usually Done Under the Direction of the Employer or a Specialist Without Supervision (Factor #3)

1. No Departure from Board Precedent

In *FedEx*, the Board held that the direction factor (Factor #3) weighed in favor of employee status because FedEx "essentially directs their [drivers'] performance via the enforcement of rules and tracking mechanisms." *FedEx*, 361 NLRB No. 55, slip op. 13. In particular, the Board noted that: (1) drivers "are required to adhere to a strict company protocol, with guidelines governing dress, appearance, safety, and the details of package delivery"; (2) FedEx "conducts periodic audits and appraisals of driver performance"; (3) FedEx "has the ability to track all major work activities – including signing in and out, and deliveries—in real-time via scanner"; and (4) FedEx "may impose disciplinary measures—including suspension and termination—if drivers fail to comply with contractual rules and procedures." *FedEx*, 361 NLRB No. 55, slip op. 13.

In concluding that Factor #3 weighed in favor of independent contractor status here, the Regional Director expressly distinguished *FedEx* in concluding that "PF does not closely supervise [the] SDAs." The Regional Director offered an extensive list of reasons in support of his conclusion:

- "SDAs are free to make their own hours";
- "The authority of [Pepperidge Farm's District Sales Managers (DSMs)] over SDAs is minimal" because "SDAs are not required to permit route rides and are not required to follow any suggestions made by a DSM on a route ride";.
- "[T]he purpose of the route rides is primarily to share ideas about increasing business" rather than to evaluate SDAs;
- "There is no evidence that any of the route ride forms have resulted in any adverse consequence to any SDA";
- "[T]he purpose of the store audits [by DSMs] is primarily used to evaluate stores, rather than the SDAs";

- "No action is taken against [SDAs] if their service frequency or billed gross amounts are below expectations";
- Letters from Pepperidge Farm addressing excessive out-of-stock or out-of-code products are "infrequent, the deficiencies have generally been resolved [by the SDA], and there is no evidence that PF has ever followed through with its threat to make other arrangements to service a store";
- Any new SDA training or periodic meetings offered to SDAs are not mandatory, and "many SDAs chose not to attend."
- "There is no evidence that SDAs are subject to any disciplinary system," and "even serious misconduct, such as driving while intoxicated, has not resulted in any discipline" from PF.

Decision at 18.

Notwithstanding the fundamental distinctions between this case and *FedEx* under Factor #3, Petitioner claims that *FedEx* compelled the Regional Director to conclude that this factor weighed in favor of employee status. Petitioner essentially contends that the infrequent route rides and store evaluations conducted by the DSMs, coupled with Pepperidge Farm's access to SDA product order information for purposes of fulfilling their requests, is tantamount to the real-time tracking of "all major work activities" in *FedEx.* RFR at 16. The Board should reject this assertion out of hand. FedEx followed its drivers' location at any given time; required daily driver logs and vehicle inspection reports, including monthly maintenance forms; provided daily route manifests and turn-by-turn instructions on how to deliver packages. *FedEx*, 361 NLRB No. 55, slip op. 5. Pepperidge Farm does nothing of the sort.

Furthermore, the Board's precedent recognizes that quality control review does not equate to usual direction or supervision. Rather, it points to a means to enforce contractual rights, typical of almost any commercial agreement. For instance, in *Porter Drywall*, the Board found that efforts to find quality problems and then demand corrections do not undermine independent contractor status. 362 NLRB No. 6, slip op. 4. Moreover, where alleged employees can refuse the "supervision" of the alleged employer without consequence – like the SDAs here

– that likewise undermines the notion of "usual" direction or supervision. *West Virginia Baking*, 299 NLRB at 316 (noting that "distributors can refuse to allow a supervisor to ride with him").

Petitioner also incorrectly asserts that the Regional Director "departed" from *FedEx* and *Browning-Ferris* because he considered whether Pepperidge Farm had actually imposed "adverse consequences" on the SDAs for contract-related performance deficiencies, and not merely Pepperidge Farm's authority to impose such consequences. Contrary to Petitioner's assertion, the Board in *FedEx* expressly relied upon FedEx's "*enforcement* of rules and tracking mechanisms." *FedEx*, 361 NLRB No. 55, slip op. 13 (emphasis added); *see also Porter Drywall*, 362 NLRB No. 6, slip op. at 2 (noting that putative employer did not, in fact, discipline putative employee where employee failed to appear at a jobsite to perform work). Indeed, given that this factor requires the factfinder to make a determination whether or not direction or supervision is "usual," it is essential to examine how the parties' relationship operates in practice. *Browning-Ferris*, which simply did not address this issue directly or indirectly, does not retroactively change the outcome.

2. No Clear Error on Substantial Factual Issue

As to the factual record on Factor #3, Petitioner asserts that its evidence on potential control was not given enough weight, or that otherwise the Regional Director discounted the significance of Pepperidge Farm's quality control/review systems under this factor.

Contrary to Petitioner's assertion, the Regional Director was fully within his discretion to discount the Store Evaluation Forms, Route Rides, and SDAs' interactions with Pepperidge Farm's District Sales Managers (DSMs). RFR at 14-16. The DSM's role in conducting periodic store evaluations, at the rate of around 10 per week across his or her entire district, is not strong evidence of PF's routine supervision of SDA activities. (T89). There are around 600 retail stores in total serviced by the 25 SDAs at issue. (E39). Even assuming that the two DSMs who

liaison with most of these 25 SDAs each conducted all 10 of their weekly evaluations within these 600 stores, and conducted no weekly evaluations at stores serviced by 17 non-Woburn SDAs within the DSMs' districts, that would amount to, at most, evaluations of *only 3%* of the stores per week (*i.e.*, 20 total evaluations of 600 stores per week). The DSMs testified that they evaluate any one store no more than 10-12 times per year (and often far less), meaning all stores remain unevaluated more than 350 days each year. (T519, 521, 677-78). When the evaluations do occur, they last just 30 minutes to 1 hour and are merely "snapshot" quality control reviews, focused not on critiquing the manner and means of how an SDA chooses to ensure a store has fresh product stocked, but instead on store relations, store shelving and space, product inventory and expiration status, and competitor activities. On Store Audits, it is thus not "inexplicable that the Regional Director would conclude that 'the purpose of the store audits is primarily to evaluate the stores rather than the SDAs'" as Petitioner suggests. RFR at 16. That is precisely what the record evidence supports.

Per the direction of the DSMs' supervisor, Director of Retail Operations Tim Mulcahy, the DSMs do not use the store evaluation to reprimand SDAs for not meeting "best practices" or not maximizing sales in the stores, or otherwise not stocking the shelves in compliance with customer plan-o-grams. (T97-98, 443-45, 448, 450). While opportunities to better service the store are noted and may be discussed with the SDA, the SDA has complete discretion to accept or reject them. (T414-15, 443-44). Only if a SDA fails to keep fresh product in stock has PF addressed the issue with them under the Consignment Agreement. (T450, 687). In that case, the SDA would be provided notice of contractual breach and be afforded five days to cure the defect ("the five-day cure letter").

In practice, the use of five-day cure letters for the petitioned-for unit is minimal; in only 1% of all store evaluations is a material contractual breach found (more than five out of code or out of stock products in one store visit, and in some cases significantly more). (T97-98, 450-51, 687). Since 2013, the majority of the 25 SDAs have never received a five-day cure letter. Among the minority who have, as few as one and no more than eight, in total, have issued. (E5). PF introduced two five-day cure letters based on contractual deficiencies attributable to employees or helpers of the SDAs. (E3, E4). Pepperidge Farm issued the cure letters to the SDA, not those other individuals, because the contract is with the SDA and not his/her employees or helpers. (T92-96). If the contractual problem is resolved, no further action or consequence has impacted the SDA.[3] (T102, 687).

The DSM "route ride" opportunity, which is offered to each SDA somewhere between one to three times per year, again does not evidence any routine supervision or direction of SDAs. (T87). The primary purpose of these route rides, which are optional for the SDA, is for the DSM and SDA to exchange ideas on how to promote sales growth and opportunities. (T275-76). These are not occasions to critique or reprimand SDAs failing to comply with recommended practices. SDAs are even free to reject route rides offered by the DSM, as SDA Provost consistently has refused to ride with DSM Serwatka. (T679); *see West Virginia Baking*, 299 NLRB at 316 (noting that "distributors can refuse to allow a supervisor to ride with him"). In fact, the DSMs testified that they prefer to ride with idea-receptive and higher sales performing SDAs, as opposed to SDAs who choose to conduct their business with minimal partnering or interaction with PF. (T420-23, T674-76).

[3] There is record evidence that even if the SDA fails or refuses to remedy the defect in the five-day letter, such as failure to stock product for a sales promotion, no further action has been taken by Pepperidge Farm. (E6; T105, 692-94). Similar evidence in *Porter* was found to support independent contractor status. 362 NLRB No. 6, slip op. 2.

Finally, while DSMs provide periodic business communications to SDAs (*e.g.*, business opportunities, customer-driven activities, etc.), these interactions merely reflect the DSM's "liaison" role with SDAs, not a supervisor-employee relationship. (T352-54); *Porter*, 362 NLRB No. 6, slip op. 4.

In sum, the Regional Director properly exercised his discretion with Factor #3 and balanced the record evidence without any "clear error."

D. Method of Payment (Factor #7)

1. No Departure from Board Precedent

On the method of payment factor, the Petitioner cites to no Board precedent, or excerpt of Board precedent, which the Regional Director allegedly "departed from." Thus, the Board can dispense with considering this basis for granting review as related to Factor #7.

2. No Clear Error on Substantial Factual Issue

In analyzing Factor #7, the Regional Director expressly weighed "aspects" of the payment method that arguably supported employee status, including the evidence cited by Petitioner in its post-hearing brief and repeated in its RFR, against several other "aspects" that supported independent contractor status. Decision at 19-20. On balance, the Regional Director concluded that this factor weighed in favor of Pepperidge Farm. *Id.* at 20. Petitioner's RFR attempts to assign greater significance to the purportedly pro-employee "aspects" of Factor #7 while at the same time minimizing the pro-independent contractor "aspects" of Factor #7 that the Regional Director ultimately found to carry more weight. Once again, however, a difference of opinion on how the evidence should have been weighed is not "clear error."

Furthermore, the Petitioner's attempt to minimize the evidence on which the Regional Director relied is misplaced. The Regional Director cited the following facts as supporting independent contractor status under the "method of payment" factor:

- "SDAs receive some compensation … from their cash accounts," whereby "SDAs control the amount of their earnings themselves by finding their own customers, setting the prices that they charge their customers, and establish billing procedures."
- "In the case of club stores such as Costco, PF pays SDAs a commission for sales, although the SDAs perform no work in connection with those sales, based on their distribution rights to stores within their territory rather than on any work performed."
- "There is considerable variability in the SDAs' weekly and annual compensation, attributable in part to their efforts and in part to the value of the customers accounts within their respective territories."
- "PF does not guarantee any minimum compensation under the Consignment Agreement or shield SDAs from ebbs and flows of market conditions."
- PF has no "right to reconfigure the SDAs' territories in response to market conditions."

Decision at 20. None of the above evidence existed in *FedEx*. FedEx gave away routes for free, and with the selling driver having little to no input in the route sales. *FedEx*, 361 NLRB No. 55, slip op. 15. FedEx's service payments reflected a model whereby the drivers working "more" would earn more, and the drivers working "less" would earn less. *Id.* at 14-15. Little opportunity existed with respect to short-term or long-term gain or loss based on their business decisions or market forces, including any equity in their routes. *Id.* In stark contrast, one SDA in the bargained-for unit has increased his route value almost three-fold over the last 12 years, from around $260,000 to around $700,000 to $800,000, based on his business decisions and market growth in his territory. (T146). The present value of <u>each</u> distributorship in the petitioned-for unit ranges between roughly $150,000 and $800,000. (E1). While a total of only two route sales had occurred among all the FedEx drivers since the terminal opened in 2000, *FedEx*, 361 NLRB No. 55, slip op. 7, 15, many of the SDAs have *themselves* been involved in two (or more) route transactions. A summary of relevant past transactions related to the 25 SDAs at issue can be found at transcript pages 64 to 77, 338 to 342, 476 to 481, and 742 to 744. Several of these SDAs are involved in current pending transactions. (T60-64). FedEx also provided a minimum compensation and substantial subsidies for emerging routes, gasoline, and

work volume reductions, *FedEx*, 361 NLRB No. 55, slip op. 14, which PF does not. (T137, 140, 458). What's more, FedEx could unilaterally curtail or reconfigure driver service areas in response to growing customer base or where a driver had excessive delivery volume, *FedEx*, 361 NLRB No. 55, slip op. 14; no similar evidence exists in this case. (T392-93, 430-31, 483-84).

In sum, the Regional Director properly exercised his discretion with Factor #7 and balanced the record evidence without any "clear error."

E. Whether the Evidence Tends to Show the Rendering of Services as an Independent Business (Factor #11)

1. No Departure from Board Precedent

Under *FedEx*, the independent business factor (Factor #11) examines whether "the putative contractor has a significant entrepreneurial opportunity;" "has a realistic ability to work for other companies"; "has proprietary or ownership interest in her work"; and "has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital." *FedEx*, 361 NLRB No. 55, slip op. 12. Petitioner does not dispute that the SDAs enjoy significant entrepreneurial opportunity, RFR at 23, as the Regional Director concluded, which weighs in favor of independent contractor status. Rather, Petitioner incorrectly asserts that the Regional Director made "entrepreneurial opportunity the controlling aspect of his determination." RFR at 21.

The Regional Director dutifully examined each of the components of Factor #11 identified in *FedEx*. Decision at 21-22. In particular, he identified numerous facts evidencing that SDAs have an ownership interest in their work and enjoy control over important business decisions, as further described in Section II.E.2 below, while also addressing the ability to work for other companies. *Id.* The Regional Director expressly considered the Petitioner's arguments

on the "independent business" issue, *id.* at 21 , but ultimately was persuaded by the extensive countervailing evidence. Further, to the extent the Regional Director found the SDAs' route equity to be an important consideration here, the Board historically has recognized the significance of route equity in finding independent contractor status for distributors in the food industry. *West Virginia Baking*, 299 NLRB at 316; *Bellacicco*, 249 NLRB at 877; *Gold Medal*, 199 NLRB at 896. The Petitioner has failed to show that the Regional Director "departed" from *FedEx*.

2. No Clear Error on Substantial Factual Issue

On the issue of "clear error," the Petitioner continues the approach of citing record evidence it deems favorable to employee status, but in general relies on facts that overlap with *other* FedEx factors previously addressed in the Petitioner's post-hearing brief or Request for Review. RFR at 22-24. Needless to say, Petitioner cannot merge multiple factors together in order to tip the scales in its favor on this final factor. Nor can the Petitioner justify Board review based on its belief that other "independent business" evidence should be given more weight under Factor #11; that discretion is properly left with the Regional Director.

Here, the Regional Director's Decision relied on the following evidence to support independent contractor status under Factor #11, which included a review of multiple issues beyond just entrepreneurial gain or loss:

- The SDAs enjoy the "right to buy and sell their routes" and "the only way a prospective SDA may acquire a PF route is to purchase one from an existing SDA."
- "[T]he SDAs themselves select the route buyers and negotiate the purchase price."
- "SDAs may choose to sell their routes to a relative for a nominal amount or to a buyer for whatever price the market will bear."
- "There is ample evidence of frequent route sales, and SDAs have earned significant sums from the sales," which confirmed that the entrepreneurial opportunity is actual and not just theoretical – unlike in *FedEx*.

- "PF has no right to reconfigure the territory that an SDA owns and wishes to sell, but SDAs have the right to and have frequently opted to reconfigure their territories by buying or selling off a partial route."
- Unlike in *FedEx*, where "the ability to sell a route had limited bearing on the status of drivers who remained in the unit and was not an incident of their ongoing relationship with FedEx," the SDAs "frequently buy and sell partial routes without ending their relationship with PF."
- SDA routes can be passed down to family members or loved ones, "which is hardly characteristic of an employer-employee relationship."
- "SDAs have the right to hire and pay employees to run their routes, and many of them do so."
- SDAs "may choose whether or not to solicit additional cash accounts within their territory and decide how much to charge their cash customers for product."
- SDAs "may influence the amount of their sales and commissions by developing relationships with store managers, by determining how much product to order, and by determining the frequency with which they service their accounts."

Decision at 22.

The totality of this evidence not only reasonably supports independent business operations under Factor #11, it shows the stark contrast with the *FedEx* decision. The Regional Director thus considered, contrary to Petitioner's assertion, evidence and issues beyond simply entrepreneurial opportunity. Because the Regional Director did not make any "clear error" on the factual record, the Request for Review should be denied.

F. Summary of Major Factual Distinctions Between *FedEx* and the Instant Case, on the Five Factors Cited in the Request for Review

Notably, other than *FedEx*, Petitioner cites to no other independent contractor decision when arguing that the Regional Director "departed" from Board precedent. Thus, it is helpful to show an overall comparison between key facts in *FedEx* and this case, as related to the five *FedEx* factors Petitioner relies on for its request for review. That analysis – summarized below in chart form – readily shows the massive disconnect between the facts in each case, and it undermines the Petitioner's attempt to cherry-pick facts it views as favorable to employee status to deem the Regional Director's decision impermissible under *FedEx.*

FedEx Facts	Pepperidge Farm Facts
Extent of Control By Employer Over Work Details	
Drivers required to be available for deliveries on specific days of the week; FedEx requires driver availability for certain hours; FedEx controls service area for drivers; FedEx controls number of packages for delivery and stops to be made; FedEx requires package delivery by certain times; FedEx employs pool of replacement drivers to cover for vacations and open routes; FedEx requires ongoing drug tests, physical examinations, and safety inspections.	SDAs are not required to work any specific days or times of the week; SDA "service" area established by their contract and exclusive distribution rights; SDAs control inventory, product ordering, and amount of product for delivery to specific stores; SDAs solely responsible for hiring their own helpers or replacements for vacations or sick periods and establish their compensation; PF requires no drug tests, physical examinations, or safety inspections.
Whether the Individual is Engaged in a Distinct Occupation or Business	
FedEx requires identical uniforms, badges, logos, colors, and vehicles, thereby limiting the ability of FedEx drivers to perform business services for others; no evidence of independent business marketing or sales efforts.	SDAs do not wear uniforms or PF badges, and PF clothing only optional; SDA trucks often contain individual SDA markings and PF logos are optional; SDAs cannot use PF logos or marks to confuse the separate identities; SDA trucks can easily be used for other business pursuits; SDAs engage in independent marketing and sales efforts, including through social media.
Whether the Work is Usually Done Under the Direction of Employer or Without Supervision	
FedEx drivers required to adhere to strict company protocol on dress, appearance, safety, and package delivery details; FedEx tracks driver location and performance of all major work activities; FedEx requires daily driver logs and vehicle inspection reports and monthly maintenance forms; FedEx provides route manifest and turn-by-instructions and delivery sequence; FedEx has contractual right to conduct "driver audits."	PF imposes no specific requirements on dress, appearance, safety, or product delivery instructions; PF does not track SDAs; DSM store audits are infrequent compared to daily volume of stores and are limited to "quality control"; SDAs are not required to file any daily or monthly driver logs or maintenance forms; SDAs solely establish their own route manifest and delivery sequence; SDAs have right to decline PF "route rides" offered 2-3 times per year.
Method of Payment	
FedEx minimizes possibility of genuine financial risk or gain; FedEx provides daily minimum compensation for drivers; FedEx provides subsidies for emerging routes; FedEx provides compensatory payment if FedEx reduces driver work volume; FedEx provides fuel/mileage subsidy for gas price increases.	PF maximizes possibility of risk or gain; PF provides no minimum compensation to SDAs; PF compensates SDAs based solely on commission and reduced inventory costs for cash accounts; PF does not subsidize gasoline; SDA income rises and falls, without subsidization, based on store openings and closing within their territory and market conditions, as well as the ability to drive incremental sales.

FedEx Facts	Pepperidge Farm Facts
Whether the Evidence Shows that the Individual is Rendering Services as an Independent Business	
FedEx driver ability to sell route is theoretical, not actual, with little to no evidence on profit or loss with limited transfers; contract drivers do not pay to acquire new or existing routes; FedEx can reconfigure or discontinue routes at any time; FedEx can require service outside driver's route; FedEx solely controls business strategy, customer base, and prices for all customers.	SDAs routinely engage in the selling and purchasing of routes or partial routes, without PF setting the price or selecting the buyer; SDAs can accumulate substantial wealth in exclusive distribution rights based on their success and market conditions, or lose wealth without any protection from PF; SDAs generally pay several hundred thousand dollars for obtaining contractual rights; PF cannot order SDA sales to other buyers; PF cannot order SDAs to deliver or sell outside their territory; SDAs have significant control over business strategy, customer service, and employee hiring; SDAs have sole control over pricing and invoicing at cash customers.

CONCLUSION

Based on his careful consideration of the extensive factual record, the Regional Director issued a thorough decision concluding that the 25 SDAs in the petitioned-for unit are independent contractors under the common law test. That determination was well within his discretion and existing Board precedent. An alternative finding would have substantially expanded established Board law on employee status, including the most recent *FedEx* decision. It also would have unraveled the SDA business relationships in place for decades, and potentially jeopardized the special status, expectations, and monetary value of distributorships to SDAs and their families.

The Petitioner has failed to provide any "compelling reason" for the Board to grant the Request for Review under the applicable standards. If review were granted here, it effectively would send the signal that all fact-intensive, multi-factor test cases should be subject to Board review, no matter how diligently the Regional Director analyzes an extensive factual record and

weighs the relevant facts and factors before him or her. For all of the foregoing reasons, Pepperidge Farm respectfully requests that the Board deny the Request for Review.

Respectfully submitted,
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Date Submitted: September 17, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2015, a copy of the foregoing Opposition to Request for Review was served, via email, upon the following:

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